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NO. 83038-0

SUPREME COURT
CLERK OF THE STATE OF WASHINGTON

JERRY D. SMITH, as Personal Representative of the ESTATE OF
BRENDA L. SMITH, Deceased, and on behalf of JERRY D. SMITH,
RICHONA HILL, JEREMIAH HILL, and the ESTATE OF BRENDA L.
SMITH,

Appellants,

v.

ORTHOPEDICS INTERNATIONAL LIMITED, PS; and PAUL
SCHWAEGLER, MD,

Respondents.

**APPELLANT'S ANSWER TO WASHINGTON STATE
ASSOCIATION FOR JUSTICE FOUNDATION AMICUS
CURIAE MEMORANDUM IN SUPPORT OF REVIEW**

Thomas R. Golden, WSBA #11040
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83038-0

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STATE OF WASHINGTON

I. ARGUMENT

A. SUMMARY OF ARGUMENT

The Washington Association for Justice Foundation [“WSAJ Foundation”] Amicus Curiae memorandum in support of review raises additional issues for this Court regarding the impact of Smith v. Orthopedics International Limited, P.S., 149 Wn.App. 337, 203 P.3d 1066 (2009), upon Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988), and its progeny. WSAJ Foundation memorandum appropriately modifies the issues pertaining to any remedial action if a Loudon violation is found. It would be reasonable for this Court to give direction to attorneys and lower courts regarding the necessity of showing prejudice and the requisite burdens of proof upon the parties.

B. PUBLIC POLICY INTERESTS SUPPORT SUPREME COURT REVIEW OF SMITH V. ORTHOPEDICS INTL LIMITED, P.S., 149 WN.APP. 337, 203 P.3D 1066 (2009).

Petitioner Smith agrees with the WSAJ Foundation that the impact of the Smith decision upon Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988), which prohibits *ex parte* contact by defense counsel with a plaintiff’s nonparty treating physician is an issue of substantial public interest under RAP 15.4(b)(4). This Court unequivocally states that Loudon’s holding of prohibiting defense counsel *ex parte* contact with a

treating physician is a matter of public policy. Loudon v. Mhyre, *supra.*, at 677.

The Smith decision raises questions regarding the existence, scope, and remedial procedures for courts and litigants. Until Smith, the Loudon decision appeared to be a “bright line” rule that all defense counsel *ex parte* contact with a nonparty treating physician was prohibited. Smith creates an apparent exception to this rule. Even more problematic is that the Smith decision would now impose upon the court a post-hoc analysis of the nature and severity of *ex parte* contact conducted under any presumed Smith exception. Trial courts will now be faced with motions for protective orders. The Loudon court specifically rejected such a solution twenty-one years ago. *See Id.* at 679.

WSAJ Foundation correctly and appropriately raises additional legal issues associated with Smith assignment of error regarding the appropriate remedy. Specifically, any Supreme Court review should also address the need for evidence of prejudice and the burden of proof of the parties in any Loudon violation court hearing. Obviously, if Loudon is a “bright line” rule, then should not prejudice be presumed?¹ In Smith, the court erroneously interposed a “prejudice” analysis in its determination of

¹ Sanctions are mandatory for CR 11 and CR 26 violations without a showing of prejudice. *See Physicians Ins. Exch. V. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993).

whether defense counsel violated Loudon. If Loudon is in fact a “bright line” rule then utilizing a nonparty treating physician’s attorney in Smith as a conduit for trial testimony, trial material, and a proposed outline for direct testimony should never have occurred and jeopardized a fair trial.

The Loudon court never discussed the necessity of showing prejudice from a defense counsel’s *ex parte* contact with a treating physician. Division III’s Rowe v. Vaagan Bros. Lumber, Inc., 100 Wn.App. 268, 280, 996 P.2d 1103 (2000), presumes prejudice or a “prejudice per se” standard. Smith would require the patient to show actual prejudice, when in the present case, the evidentiary hearing was denied and the identification of the direct testimony outline for Dr. Johansen withheld until after the jury verdict and denial of post-trial motions (RP 11/19/07 pp. 61-63; 79-81).²

If review is granted, the Supreme Court should allow the parties and any amicus curiae to prepare additional briefing on this issue.

In the WSAJ Foundation’s memorandum, footnote 1 references:

There was evidence that the lawyers for Orthopedics International also provided Dr. Johansen as a witness for Orthopedics International although it does not appear that Dr. Johansen’s lawyer forwarded this document to Dr. Johansen.

² Smith contended prejudice in its appeal. See Brief of Appellant pp. 36-38.

For the benefit of the Court and amicus, clarification of whether the testimony outline was actually received by Dr. Johansen was not fully ascertained because the trial court denied the request for an evidentiary hearing and kept the identity and content of the testimony outline from Smith's counsel.

At the November 19, 2007 court hearing, it was first ascertained that a third item was prepared by defense counsel and forwarded to Rebecca Ringer for transmittal to Dr. Johansen. Dr. Schwaegler and Orthopedics International claimed work product privilege. (RP 11/19/07 pp. 48–49). Identification of this third item as Mr. Johnson's outline for Dr. Johansen's direct testimony and its content was withheld from Smith's counsel by the trial court until after the court denied Smith's motion for new trial. (RP 11/19/07 pp. 79–80; RP 12/19/07 pp. 34–36).

C. RCW 5.60.060(4) POTENTIAL ISSUES

While Petitioner Smith welcomes the WSAJ Foundation support for Supreme Court review of the previously discussed Loudon issues, the issues for review by the Supreme Court need not utilize the Smith case to resolve the theoretical question of the effect of RCW 5.60.060(4) upon Loudon and its progeny. Any Supreme Court review should focus upon the threshold question of whether defense *ex parte* contact with a nonparty

treating physician is a Loudon violation, and if so, what is the requisite burden of proof and remedy.

The RCW 5.60.060(4) waiver language was never raised, briefed or argued by Respondents as a defense to their actions in the trial court, Court of Appeals or the Supreme Court in the Answer to Petition for Review.

Petitioner is unaware of any legislative intent indicating the tort reform legislation of 1986 was specifically intended to abrogate Loudon or its public policy foundations. The more recent Rowe v. Vaagen Brothers Lumber, Inc., 100 Wn. App. 268, 996 P.2d 1103 (2000), is silent on any statutory abolishment of Loudon.

Loudon protections were reinforced and expanded in the Labor & Industries arena most during the recent legislative session. See Laws of 2009, Ch. 391 §1. It is questionable to suggest the seminal case prohibiting defense *ex parte* contact with treating physicians has been without legal foundation for two decades.

II. CONCLUSION

Any Supreme Court review of Smith should include the additional issues regarding the role of prejudice and the burden of proof upon the parties in any Loudon violation hearing.

Respectfully submitted this 3rd day of August, 2009.

Otorowski Johnston Diamond & Golden



Thomas R. Golden, WSBA #11040



for

Christopher L. Otorowski, WSBA #8248

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CERTIFICATE OF SERVICE

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I certify that on the 3rd day of August, 2009, I caused a true and
correct copy of the foregoing document to be served on the following
counsel of record by ABC Legal Messenger Services:

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Dated this 3rd day of August, 2009, at Bainbridge Island,
Washington.



Sara Davis
Legal Assistant to Thomas R. Golden, Esq.

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OFFICE RECEPTIONIST, CLERK

To: Sara Davis
Cc: Tom Golden
Subject: RE: Smith v. Orthopedics International Limited, P.S., No. 83038-0

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From: Sara Davis [mailto:srd@medilaw.com]
Sent: Monday, August 03, 2009 12:00 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Tom Golden
Subject: Smith v. Orthopedics International Limited, P.S., No. 83038-0

Dear Clerk:

Attached for filing please find the Appellant's Answer to Washington State Association for Justice Foundation Amicus Curiae Memorandum in Support of Review.

This is filed by appellants' attorney, Thomas R. Golden, WSBA #11040, who can be reached at (206) 842-1000 or at trg@medilaw.com.

The original signed document will be retained in our file.

Thank you for your assistance.

Sincerely,

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